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To: Examiner Alissa L. Hoey

Serial No. 10/693,129 Barbara Jennings

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In The United States Patent and Trademark Office
Before The Board of Appeals and Interferences

**In re application of
Barbara Jennings
Serial No. 10/693,129
Filed: October 24, 2003
Entitled: PROTECTIVE GARMENT FOR A PATIENT**

**Examiner Alissa L. Hoey
Group Art Unit: 3765**

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Substitute Appeal Brief under 37 CFR § 41.37

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In re application of

Barbara Jennings

Serial No. 10/693,129

Examiner Alissa L. Hoey

Filed: October 24, 2003

Group Art Unit: 3765

Entitled: PROTECTIVE GARMENT FOR A PATIENT

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Pittsburgh, Pennsylvania 15237
October 18, 2006

Mail Stop Appeal Brief – Patent
Commissioner for Patents
P.O. Box 1450
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Sir:

Substitute Appeal Brief under 37 CFR § 41.37

This Substitute Brief is submitted in response to the Notification of October 16, 2006 of a defective brief. The new Brief is identical to the original except for a new statement of the Status of claims; Summary of claimed subject matter restricted to the narrower set of claims under appeal ; and the narrower identification of claims in appellant's argument in section vii.

(i) Real party in interest.
Barbara Jennings

(ii) Related appeals and interferences.
37CFR§ 41.39 (c) (1) (ii)
None

(iii) Status of claims.
Claims 2, 3, 5-7, 13, 14, 18 and 21 have been finally rejected pursuant to an

Official Action dated December 23, 2005. Claims 8, 9, 12, 15-17, 19 and 21 stand as withdrawn from consideration. Claims 1, 4, 10, 11, 16 (second) and 17 (second instance) have been cancelled. Claims 2, 3, 5-7, 13, 14, 18 and 21 are the claims under appeal.

(iv) Status of amendments.

There have been no amendments filed subsequent to the final rejection.

(v) Summary of claimed subject matter.

The following is submitted to comply with the requirement for a concise explanation of the subject matter defined in each of the independent claims involved in the appeal, referring to the specification by page and line number and to the drawings by reference characters; and for each independent claim involved in the appeal and for each dependent claim argued separately, and the structure, material, or acts described in the specification as corresponding to each claimed function with reference to the specification by page and line number, and to the drawings, by reference characters 37 CFR 41.37 (c)(1)(v). There are no claim recitations of means plus function and step plus function under 35 U.S.C. 112, sixth paragraph.

Claim 21 is in independent form and recites:

"A garment used by a caregiver to manipulate a patient, said garment comprising:"

See Page 1 lines 9-13 and page 7, lines 15-17

"a garment body --"

See reference character 14, Figure 1, and page 7, lines 15-20.

"According to one aspect of the present invention, as shown in Figure 1 there is provided a garment 10 used by a caregiver to manipulate the patient, illustrated and identified by reference numeral 12. The garment 10 includes a garment body 14 including front garment portion 10F and a back garment portion 10B constructed and arranged for traversing front area 12F and back area 12B of the patient from at least a waist line area 12W of the patient."

"including a front garment portion and a back garment portion --"

See reference characters 10F and 10B, Figure 1 and page 7, lines 17-20.

"The garment 10 includes a garment body 14 including front garment portion 10F and a back garment portion 10B constructed and arranged for traversing front area 12F and back area 12B of the patient

from at least a waist line area 12W of the patient."

"traversing front and back areas, respectively, of said patient between at least a garment waist line area to a right tail portion and a left tail portion forming a garment body interconnection between said front garment portion and said back garment portion passing through the groin area of said patient to anchor said garment body in a direction perpendicular to said waist line area; -- "

See reference characters 12F, 12B, 10W, 16 and 18, Figures 1,2, 7A, 7B, 8A, 8B, 9A, 9B, 10A and 10B; Page 7, lines 17- page 8, line 4; Page 8, lines 7-12 and page 11, lines 1-11.

"The garment 10 includes a garment body 14 including front garment portion 10F and a back garment portion 10B constructed and arranged for traversing front area 12F and back area 12B of the patient from at least a waist line area 12W of the patient. The garment body 14 is provided with extended garment portions 16, 18 and 24 movable into positions to cover e.g. traverse at least part a patient and forming a garment body interconnection between the front garment portion 10F and the back garment portion 10B. The extended garment portions 16, 18 and 24 have lengths sufficient to anchor the front and back garment portions about the garment waist area 10W in at least one direction perpendicular to the waist line area 12W of the patient. The waist line area 12W corresponds substantially to the waist line area 10W of the garment 10."--

"The portions 16 and 18 in the embodiment shown in Figure 1 take the form of a right tail portion and a left tail portion passing through the groin area i.e. crotch of the patient. In other embodiments described hereinafter the portions 16 and 18 take the form of trouser leg portions preferably with a releasable leg closure structure extending about the inseam of the trouser."--

"Figures 9A and 9B are front and back views, respectively, of a lower garment 70 for a male patient 12 (shown in Figure 1). Figures 10A and 10B are front and back patterns for lower garment 70. Lower garment 70 is formed as short trousers having waist handholds 138, and back waist handhold 142, as well as additional handholds 43 located on thigh portions of lower garment 70. Lower garment 70 has a cutout 72 in the crotch area to prevent compression of genital organs of male patient 12. An undergarment 74, which in this embodiment is sweat shorts, is visible in Figures 9A and 9B. In its presently preferred embodiment, lower garment 70 is openable along inseam 76 to facilitate removal of undergarment 74 for toileting. Lower garment 70 is also re closeable along inseam 76 by

devices such as hooks, snaps, zippers or hook and loop fasteners such as Velcro."

"attachment devices carried by a distal end of said right tail portion and a distal end of said left tail portion to form interconnections with said garment body; --"

See reference characters 22, 16, 18 and 76; Figures 1, 2, 3, 10A and 10B; and Page 9, lines 6- 4, page 11, lines 9-11.

"For garment 10, left tail portion 16 and right tail portion 18 are attached to attachment devices 22. It is presently preferred that attachment devices 22 be loops. Preferably, distal end 17 of left tail portion 16 is drawn through the left loop 22 and attached back on itself by hook and loop fasteners (not shown), of which Velcro is a well known brand name. Likewise, distal end 19 of right tail portion 18 is drawn through the right loop 22 and attached back on itself by hook and loop fasteners (not shown). For garment pattern 20, left tail portion 16 and right tail portion 18 are drawn through fastening devices 154 and fastened back on themselves. It is presently preferred that fastening devices 154 be reinforced openings."

"and, a plurality of handholds on said garment body for use by a caregiver to manipulate said patient."

See reference characters 38, 42, 152; Figures 1, 2, 3, 13A and 13B and Page 9, lines 19-20, Page 9, line 22 to page 10, line 8.

"Garment 10 further includes lower front handholds 38."---

"Garments 10 and 20 also comprise upper side handholds 40. Garment 10 further comprises lower side handholds 140 disposed adjacent bottom edge 11 of garment 10. In the embodiments illustrated, handholds 36, 38 40, 42, 150 and 156 each comprise parallel openings defining a strap there between. A preferred construction of these handholds is shown in Figures 13A and 13B. Figure 4 illustrates a plurality of reinforcing patches 48, which are applied around the openings 45 shown in Figure 13A, as illustrated in Figure 13B. Reinforcing patches 48 may include padding (not shown) in the back and side garment grips with fiber, synthetic padding or gel when desired to protect the hand of the caregiver and skin of the patient."

Claims 2, 3, 5-7, 13, 14 and 18 are in dependent form.

Claim 2 recites:

"The garment according to claim 21 further including short trouser garment leg portions and attachment devices operable along an inseam of said short trouser garment leg portions for reattachment of garment margins along said inseam."

See reference character 70; Figures 9A, 9B, 10A and 10B; and Page 11, lines 3-11.

"Lower garment 70 is formed as short trousers having waist handholds 138, and back waist handhold 142, as well as additional handholds 43 located on thigh portions of lower garment 70. Lower garment 70 has a cutout 72 in the crotch area to prevent compression of genital organs of male patient 12. An undergarment 74, which in this embodiment is sweat shorts, is visible in Figures 9A and 9B. In its presently preferred embodiment, lower garment 70 is openable along inseam 76 to facilitate removal of undergarment 74 for toileting. Lower garment 70 is also closeable along inseam 76 by devices such as hooks, snaps, zippers or hook and loop fasteners such as Velcro."

Claim 3 recites:

"The garment according to claim 21 further including short trouser garment leg portions having an opening in a crotch area to avoid compression of genital organs of a male patient."

See reference character 72, Figures 10A and 10B and page 11, lines 5-6.

"Lower garment 70 has a cutout 72 in the crotch area to prevent compression of genital organs of male patient 12."

Claim 5 recites:

"The garment according to claim 21, wherein said garment body is made of a soft, quilted fabric for patients who generally remain in bed."

See reference character 14 and Page 10, lines 10-11.

"Unitary body 14 may be formed of a soft, quilted fabric for a male patient 12 who generally remains in bed."

Claim 6 recites:

"The garment according to claim 21 wherein said garment body is made of a non-stretch fabric for a patient."

See reference character 14 and Page 10, lines 11-13.

"Alternatively, unitary body 14 of garment 10 may be formed of a non-stretch performance or sport fabric for a patient in physical therapy, and for partial weight bearing patients. Mesh fabric may be used for disposable garments."

Claim 7 recites:

"The garment according to claim 21 further including a left loop and a right loop disposed on said front garment portion for passage of each of distal end of said right tail portion and said distal end of said left tail portion, back on itself .."

See reference characters 22, 16 and 18 Figures 1, 2 and 3 and page 9, lines 7-13.

"It is presently preferred that attachment devices 22 be loops. Preferably, distal end 17 of left tail portion 16 is drawn through the left loop 22 and attached back on itself by hook and loop fasteners (not shown), of which Velcro is a well known brand name. Likewise, distal end 19 of right tail portion 18 is drawn through the right loop 22 and attached back on itself by hook and loop fasteners (not shown). For garment pattern 20, left tail portion 16 and right tail portion 18 are drawn through fastening devices 154 and fastened back on themselves."

Claim 13 recites:

"The garment according to claim 21 wherein said garment body includes side garment portions between said front garment portion and said back garment portion, and wherein plurality of handholds further includes at least two handholds disposed on said side garment portions."

See reference characters 40 and 140; Figures 1, 2 and 3; and Page 9, lines 21-23.

"Garments 10 and 20 also comprise upper side handholds 40. Garment 10 further comprises lower side handholds 140 disposed adjacent bottom edge 11 of garment 10."

Claim 14 recites:

"The garment according to claim 21 wherein at least one of said handholds are formed in said

garment body and includes a pair of parallel openings defining a strap there between for grasping by a caregiver."

"See reference characters 44, 45, 46, 47 and 100; Figures 13A and 13B; and Page 10, lines 1-3, page 11, line 22 to page 12, line 2.

"In the embodiments illustrated, handholds 36, 38 40, 42, 150 and 156 each comprise parallel openings defining a strap there between."

"Figure 13A shows a handhold 44 that may be employed at any location on any embodiment of this invention. Handhold 44 includes parallel openings 45 cut in fabric 100. Parallel openings 45 define strap 47 there between. Preferably, handhold 44 includes stitching 46 to strengthen handhold 44."

Claim 18 recites:

"The garment according to claim 21 wherein said plurality of handholds includes at least one rigid member in said garment body for improving a grip by a caregiver to manipulate a patient."

See reference characters 90, 92 and 94; Figures 14 and 15; and Page 12, lines 10-13.

"Figures 14 and 15 illustrate an alternative handhold 90 that is generally employable on front portions or sides of garments. Handhold 90 includes a rigid member, preferably a rod 92 having rounded or chamfered end 94. Figure 14 is a view of handhold 90 assembled and Figure 15 illustrates section 15-15 in Figure 14."

(vi) Grounds of rejection to be reviewed on appeal.

The broad issues presented in this appeal are whether the subject matter of the present invention was patented in prior art references and whether the subject matter of the present invention and a prior art reference is such that the subject matter of the present invention, taken as whole, would have been obvious at the time of the invention to one skilled in the art.

More particularly, the issues are anticipation under 35 U.S.C. §102(b) of claims 2, 3, 5, 6, 13, 14, 18 and 21 by Jennings (US 6,230,329) (hereinafter Jennings); anticipation under 35 U.S.C. §102(b) of claim 18 by Harlem et al* (US 5,799,328) (hereinafter Harlem) and

* The argument of the rejection references Jennings and appears to be a typographic error

obviousness under 35 U.S.C. §103(a) of claim 7 over Jennings (US 6,230,329) (hereinafter Jennings).

(vii) Argument.

The fundamental basis of this appeal resides in appellant's belief that the Jennings and Harlem references fail to provide an anticipatory disclosure or an obvious suggestion of the recitation in parent claim 21 of:

--a right tail portion and a left tail portion forming a garment body interconnection between said front garment portion and said back garment portion passing through the groin area of said patient to anchor said garment body in a direction perpendicular to said waist line area." (Emphasis added)

The Jennings reference is appellant's prior patent. Claim 21 is to a combination of a garment body having handholds; front and back portions interconnected by the aforesaid right and left portions to anchor in a direction perpendicular to the waistline.

The argument of the rejection of claim 21 rewrites the Jennings specification by wrongly identifying "a right tail portion 24" and "a left tail portion 24". Factually Jennings discloses a flap 21 having a free end 24. Column 3, lines 30-40 describe:

"An elongated tail flap 21 extends downward centrally from a lower extremity of body portion 14 centrally between leg cutouts 19. Flap 21 includes a suitable adjustable closure such as a plural pairs of snaps or clasps 22 located in spaced apart relation along a line extending from the free end 24 of flap 21. The closure pairs 22 mate with cooperating closure elements 26 located to be positioned centrally of the lower, frontal aspect of garment when donned by a wearer. The fit of the garment is adjusted, as deemed appropriate for its purpose, by selecting for use one or another of the closure pairs 22."

The rejection wrongly attributes a teaching by Jennings of:

"--The right tail portion and the left tail portion passing through the groin area of the patient to anchor the garment body in a direction perpendicular to the waist line area (figure 3). Attachment devices (22) carried by the distal end of the right rail portion (24) and distal end of the left tail portion (24) to form interconnections with the garment body (figures 3 and 4).--" (Pages 2 and 3 of the final rejection)

A perusal of the Jennings reference reveals the teaching of the operation of closures members on the flap 21 as:

"To put on the garment 10, the wearer inserts the arms through a pair of armholes 26 with the garment 10 behind, as though putting on a robe. Closures 16 and 18 are secured, and the free end 24 of flap 21 then is brought under the crotch from back to front and the closure elements 22 and 26 secured to provide the desired degree of taughtness. When being worn, the garment appears as in FIGS. 3 and 4." (Jennings Column 3, lines 46-52)

In view of the forgoing, it is submitted improper to interpretation the Jennings reference as teaching one skilled in the art to provision of two tail portions and to construct and arrange the tail portions as recited in Appellant's claim 21 as noted supra. Appellant's argue it is reversible error to resort to hindsight use of Appellant's invention is to reconstruct the prior art reference.

The Harlem reference is relied on as the basis for the rejection of claim 18 as anticipated. This prior art reference clearly fails to disclose the structure of the combination of a right tail portion and a left tail portion forming a garment body interconnection between said front garment portion and said back garment portion as recited in parent claim 21 of claim 18. Harlem discloses pants of a garment having a different construction:

"Referring to FIG. 1, there is shown one preferred embodiment of the present invention garment 10. The exemplary embodiment shows the present invention garment 10 in the form of a long sleeved shirt 12 and a pair of pants 14. *The purpose of the present invention is to provide a garment system to a person suffering from hemiplegia or hemiparesis, wherein the garment system helps in the physical, cognitive and emotional rehabilitation of the patient.*" (Harlem Column 3, lines 10-17) Emphasis added

The absence of left and right tail portions must be duly noted and particularly the solution to the problems identified by the present inventor for accomplishing an interconnection between the front and rear portions of the garment through the groin area of the patient. The construction of the pants 14 in Harlem is common, as for example:

"The pants 14 also use a crossing flap 34 to adjust the waistline of the pants 14. The waistline crossing flap 34 enables the waistline of the pants 14 to be opened widely, thereby enabling easy access of a brace encumbered leg. The crossing flap 34 and the fly

36 below the crossing flap 34 both include hook and loop fasteners. The use of hook and loop fasteners on both the waistline crossing flap 34 and fly 36 permits the easy one-handed opening and closing of these structures. The hook and loop fasteners also eliminate the need for buttons, hooks and zippers which are very difficult to fasten with only one hand." (Harlem Column 3, line 66 to column 4, line 9)

The disclosure of the grasping tabs 44 does not address the problems identified in the specification and addressed by the present invention at page 3, lines 1-13, namely:

"Yet another object of the present invention is to provide a garment for moving or positioning a male patient, the garment having a bifurcate portion for passing through the crotch of the patient to prevent discomfort.

A further object of the present invention is to provide, for a weak or paralyzed patient, a garment having separate top and bottom portions, the portions having handholds to facilitate moving or positioning the patient.

It is an additional object of the present invention to provide, for a weak or paralyzed male patient, a bottom garment having handholds and a bifurcate portion passing through the crotch of the patient to prevent discomfort.

Still yet, another object of the present invention is to provide, for a weak or paralyzed male patient, a bottom garment having handholds and a bifurcate portion passing thought the crotch of the patient to prevent discomfort, the bifurcate portion including a pair of tail portions."

Wholly failing the objects of the present invention is the provision of grasping tabs in the otherwise conventional pants 14. See for example Harlem Column 4, lines 10-22:

"A key feature of the present invention garment 10 is the use of grasping tabs on the limb portions of both the shirt 12 and the pants 14. In the shown embodiment, two grasping tabs 40 are disposed on the shirt 12 and a plurality of grasping tabs 44 are disposed on the pants 14. The grasping tabs 40 are attached to a forward exterior surface of each shirt sleeve 25, 27 and to the front and back of each pants leg 28, 30. The grasping tabs 40, 44 preferably are flexible hoops made of fabric or rigid hoops made of plastic or metal. Regardless of the material of the grasping tabs 40, 44, it is desirable that the grasping tabs have a hoop configuration, T-shaped configuration or another configuration that enables the grasping tabs 40, 44 to be easily grasped and pulled with one hand."

An accurate determination of the scope and content of the Jennings reference as well as the Harlem reference as required by the Supreme Court in *Graham v. John Deere* 148 USPQ 459 is clearly lacking. The argument of the rejections of all the claims 2, 3, 5, 6, 13, 14,

18 and 21 asserts a catalogue of parts appearing in the Appellant's claims is shown in the Jennings reference. The combinations are not disclosed since the prior art fails to teach or disclose left and right tail portions. The same position is taken in the argument of the rejection of claim 18 based on the Harlem reference.

Appellant's claim 7 stands rejected as obvious over the Jennings reference, although additional prior art is not cited to support the conclusion of obviousness. The rejection acknowledges that:

"Jennings fails to teach a left loop and a right loop disposed on the front garment portion for passage of each of distal end of the right tail portion and the distal end of the left rail portion, back on itself." (Page 4, Paragraph 5 of the final rejection)

This rejection should be reversed in view of the improper interpretation of the Jennings reference contending that there is disclosure of left and right tail portions in the immediately following paragraph of the final rejection.

In Glaverbel Societe Anonyme v. Northlake Marketing & Supply Inc. 33 USPQ2d 1496 (Fed. Cir. 1995) at 1498, the principle of anticipation was explained by the Court.

"In determining whether a patented invention is anticipated, the claims are read in the context of the patent specification in which they arise and in which the invention is described. If needed to impart clarity or avoid ambiguity, the prosecution history and the prior art may also be consulted in order to ascertain whether the patentee's invention is novel or was previously known to the art." *Lindemann*, 730 F.2d at 1458, 221 USPQ at 485 ("In deciding the issue of anticipation, the trier of fact must identify the elements of the claims, determine their meaning in light of the specification and prosecution history and identify corresponding elements disclosed in the allegedly anticipating reference.") Cf. *Slimfold Mfg. Co. v. Kinkead Indus., Inc.*, 810 F.2d 1113, 1116, 1 USPQ2d 1563, 1566 (Fed.Cir.1987) (Claims are not interpreted "in a Vacuum").

The examiner has not carried the burden of establishing anticipation. The claimed recitations have not been read in light of Appellant's specification and the rejection should be reversed.

In the rejection of Appellant's sole independent claim 21 is stated by inserting the Appellant's disclosed teaching in the Jennings reference, thus rewriting the specification using appellant's claim terminology. The interpretation required the improper hindsight use of Appellant's invention.

For the foregoing reasons, the Appellant requests that the rejection of Appellant's claims be overturned.

Respectfully submitted,



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(viii) Claims appendix. A

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2. The garment according to claim 21 further including short trouser garment leg portions and attachment devices operable along an inseam of said short trouser garment leg portions for reattachment of garment margins along said inseam.
3. The garment according to claim 21 further including short trouser garment leg portions having an opening in a crotch area to avoid compression of genital organs of a male patient.
5. The garment according to claim 21, wherein said garment body is made of a soft, quilted fabric for patients who generally remain in bed.
6. The garment according to claim 21 wherein said garment body is made of a non-stretch fabric for a patient.
7. The garment according to claim 21 further including a left loop and a right loop disposed on said front garment portion for passage of each of distal end of said right tail portion and said distal end of said left tail portion, back on itself .
13. The garment according to claim 21 wherein said garment body includes side garment portions between said front garment portion and said back garment portion, and wherein plurality of handholds further includes at least two handholds disposed on said side garment portions.
14. The garment according to claim 21 wherein at least one of said handholds are formed in said garment body and includes a pair of parallel openings defining a strap there between for grasping by a caregiver.
18. The garment according to claim 21 wherein said plurality of handholds includes at least one rigid member in said garment body for improving a grip by a

caregiver to manipulate a patient.

21 A garment used by a caregiver to manipulate a patient, said garment comprising a garment body including a front garment portion and a back garment portion traversing front and back areas, respectively, of said patient between at least a garment waist line area to a right tail portion and a left tail portion forming a garment body interconnection between said front garment portion and said back garment portion passing through the groin area of said patient to anchor said garment body in a direction perpendicular to said waist line area; attachment devices carried by a distal end of said right tail portion and a distal end of said left tail portion to form interconnections with said garment body; and a plurality of handholds on said garment body for use by a caregiver to manipulate said patient.

ix Appendix B**Copies of evidence submitted under:****1. 37 CFR §1.130 None****2. 37 CFR §1.131 None****3. 37 CFR §1.132 None****4. Any evidence entered by the examiner and relied upon by appellant in the appeal:****i. U.S. patent 6,230,329 entered in the record by the examiner by the official action dated July 13, 2005,****ii. U.S. patent 5,799,328 entered in the record by the examiner by the official action dated July 13, 2005.**

SENT BY: CLIFFORD A. POFF;

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PAGE 18/18

x Appendix C

Related proceedings appendix pursuant to 37CFR§ 41.39 (c) (1) (x)

PAGE 18/18 *RCVD AT 10/18/2006 3:21:42 PM [Eastern Daylight Time]* SVR:USPTO-EFXRF-5/13* DNIS:2738300* CSID:412 366 8203 *DURATION (mm:ss):05:10